

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C.

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JUN 14 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Amendment of Section 73.658(k) of  
the Commission's Rules to Delete  
the "Off-Network" Program  
Restriction )

MMB File No. 920117A

Amendment of Section 73.658(k) of  
the Commission's Rules to Delete  
the "Off-Network" Program  
Restriction )

MMB File No. 870622A

Constitutionality of Section  
73.658(k) of the Commission's  
Rules ("Prime Time Access Rule") )

MMB File No. 900418A

To: The Commission

**COMMENTS OF THE FBC TELEVISION AFFILIATES ASSOCIATION**

**FBC TELEVISION AFFILIATES  
ASSOCIATION**

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Dated: June 14, 1994

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## **SUMMARY**

The FBC Television Affiliates Association (the "Fox Affiliates") urges the Commission to deny the three requests before it, and take no action at this time to alter the Prime Time Access Rule ("PTAR") in its present form.

The Fox Affiliates see no legal or policy reason to eliminate or modify PTAR in any respect. The constitutionality of PTAR is beyond dispute, having been affirmed on two separate occasions by the courts. On policy grounds, the Commission has very broad discretion in considering whether or not to initiate a rulemaking proceeding looking toward the elimination or modification of PTAR. Given that broad discretion, the Commission should only consider undertaking such a proceeding if a compelling justification is shown for doing so.

No such justification has been demonstrated. PTAR has served well the purposes for which it was adopted; namely, to foster a healthy first-run syndication industry and enhance the vitality of independent stations. There is no point in eliminating or modifying a rule that has not been shown to be broken -- particularly when doing so would threaten to significantly curtail the growth of stations such as the Fox affiliates which PTAR has helped bring about.

In addition, the Commission should be especially loath to tamper with PTAR in light of the seismic changes in the television programming marketplace that will occur upon the elimination of the closely related Financial Interest and Syndication Rules. Until the radically reshaped post-fin syn marketplace has a chance to play out, it would be very risky and premature for the Commission to disturb PTAR -- the one core regulation that remains to protect first-run producers and the independent television industry.

For all these reasons, the Commission should, at least for the time being, retain PTAR in its present form.

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To: The Commission

**COMMENTS OF THE FBC TELEVISION AFFILIATES ASSOCIATION**

The FBC Television Affiliates Association (the "Fox Affiliates" or the "Association"),  
by its attorneys and pursuant to the Commission's Public Notice of April 12, 1994, hereby  
submits its comments on the above-captioned pleadings filed by First Media Corporation  
("First Media"), Channel 41, Inc. ("Channel 41"), and Hubbard Broadcasting, Inc.  
("Hubbard"). Each of these pleadings raises the question of whether there is presently any  
compelling legal or policy justification for eliminating or altering the Prime Time Access  
Rule ("PTAR"). As set forth below, the Fox Affiliates -- who, largely because of PTAR,  
have been able to survive as independent stations and ultimately grow as affiliates of the Fox

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Broadcasting Network ("Fox") -- see no legal or policy reason at this time for any change in PTAR.

## **I. Introduction**

### **A. The Interest of the Fox Affiliates**

1. The Association represents the television stations throughout the United States that are affiliated with the Fox Network, but are not owned and operated by Fox. Virtually all of these stations (the vast majority of which are UHF stations) began their existence as full independent stations, facing a severe disadvantage in competing in their local markets with the established, mainly VHF affiliates of ABC, CBS and NBC.

2. Without the ability to rely on programming supplied by these three networks, the survival of the independent stations that are now affiliated with Fox depended in large part on the stations' ability to acquire attractive syndicated programming -- in particular, highly popular off-network programs. PTAR made this possible. By preventing affiliates of ABC, CBS and NBC in the top 50 markets from filling all of the critical prime-time viewing period with network programs, and by additionally providing that those affiliates could not fill the non-network portion of prime time with off-network programs, PTAR ensured that independent stations could obtain and air during one hour of prime time the popular off-network syndicated programming so crucial to those stations' viability.

3. In short, PTAR has played a vital role in the survival and growth of the Fox affiliates. Without the ability to carry valuable off-network product in the critical prime time access period that PTAR made possible, many of the Fox affiliates likely would not have survived for long after their inception. In large part due to PTAR, however, the Fox

affiliates were able to maintain financial viability, and through their affiliations with the Fox Network, now have increased their ability to provide additional innovative, high-quality entertainment programming as well as expanded local news, public affairs, and children's programming.

4. Moreover, the ability of the Fox affiliates to continue to air off-network programming in the access period remains crucial. Despite the increased competitive viability provided by their Fox Network affiliations, the top 50 market Fox affiliates by and large still face severe competitive disadvantages vis-a-vis their established ABC, CBS, and NBC-affiliated counterparts. Many of these Fox affiliates have not yet been able to implement plans for local news and other high-quality programming. Any decrease in their ability to air popular off-network programming in the prime time access hour would jeopardize these plans, and would seriously curtail the full potential of these stations to maximize program diversity and achieve competitive parity with the affiliates of ABC, CBS and NBC -- a potential that has been made possible largely because of PTAR.

5. The Fox Affiliates have participated extensively in all phases of the now-four year old proceeding concerning the related Financial Interest and Syndication Rules ("the "fin/syn" rules). For the reasons set forth above, the Fox Affiliates -- from the very beginning of that proceeding -- have never advocated any change in PTAR.

**B. The Pleadings At Issue**

6. The three pleadings at issue in this proceeding, filed by two top 50 market ABC affiliates and one top 50 market CBS affiliate, each seek to eliminate or modify PTAR in one way or another. First Media contends that PTAR, in its entirety, must be eliminated

because it is no longer constitutional. Channel 41 and Hubbard do not challenge the rule as a whole, but instead seek elimination of the so-called "off-network" restriction -- i.e., the aspect of PTAR that forbids affiliates of ABC, CBS and NBC from filling the non-network hour of prime time with off-network syndicated programming. While Channel 41 and Hubbard also raise constitutional arguments, their pleadings focus mainly on policy grounds. Channel 41 and Hubbard contend that the off-network restriction was developed without an adequate factual record; that the restriction is in any event now unnecessary because of changes in the video marketplace; and that the off-network restriction impedes the ability of local ABC, CBS and NBC affiliates to compete in their local markets.

7. The issue before the Commission is whether there is any legal or policy reason to disturb PTAR in any respect. This issue must be viewed in light of the undeniable fact that PTAR has succeeded -- and continues to succeed -- in fulfilling the purposes for which it was adopted. The Fox Affiliates believe that when the issue is considered in this light, and in the context of the Commission's broad discretion to consider whether or not to modify or eliminate its rules, there is presently no basis for altering PTAR.

## **II. Discussion**

### **A. PTAR's Constitutionality Is Well-Settled**

8. Despite the arguments raised by First Media, Channel 41, and Hubbard, there is really no serious question as to PTAR's constitutionality. Shortly after the rule was adopted, the United States Court of Appeals for the Second Circuit affirmed its constitutionality in the face of First Amendment challenge. See Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971). Four years later, the Second Circuit again



rejected First Amendment challenges to an amended version of PTAR. See National Association of Independent Television Producers and Distributors v. FCC, 516 F.2d 526, 536-37 (2d Cir. 1975). Thus, the courts have already twice affirmed PTAR's constitutionality.

9. Subsequent cases have not altered these court affirmations. While the First Media and Hubbard petitions rest heavily on the Commission's constitutional analysis in Syracuse Peace Council, 2 FCC Rcd 5043 (1987), that analysis was not affirmed by the courts. See Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990). Moreover, while it is claimed that the Supreme Court's decision in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), has been undermined, the Court only recently cited Red Lion with approval in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566-67 (1990).

**B. There Is Presently No Policy Justification for Disturbing PTAR**

10. As the constitutionality of PTAR is not a matter of dispute, the only remaining issue is whether there is any policy justification for altering or eliminating PTAR. The Fox Affiliates believe that no such justification presently exists.

**1. The Commission Has Broad Discretion in Considering Whether to Undertake a Rulemaking to Eliminate or Modify PTAR**

11. The requests of First Media, Channel 41, and Hubbard to eliminate or modify PTAR must be viewed in light of the fact that the Commission has very broad discretion in considering whether to institute a proceeding looking toward such a result. "The decision to

institute rulemaking is one that is largely committed to the discretion of the agency. . . ."

WWHT, Inc. v. FCC, 656 F.2d 807, 809 (D.C. Cir. 1981). As the legislative history of the Administrative Procedure Act indicates, "[t]he mere filing of a petition does not require an agency to grant it, or to hold a hearing, or engage in any other public rule making proceedings." Id. at 813 (quoting S. Rep. No. 752, 79th Cong. 1st Sess. (1945)). Thus, "as a corollary of [its] broad general discretion, the Commission has considerable latitude in responding to requests to institute proceedings or to promulgate rules." Action for Children's Television v. FCC, 564 F.2d 458, 479 (D.C. Cir. 1977).

12. Added to the Commission's broad discretion to engage or not engage in rulemaking proceedings is the presumption that an existing rule is valid. Thus, in Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983), the Supreme Court held that an agency changing course by rescinding or modifying a rule "is obligated to supply a reasoned analysis for the change." In so holding, the Court stated that:

the forces of change do not always or necessarily point in the direction of deregulation. In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation. If Congress established a presumption from which judicial review should start, that presumption -- contrary to petitioners' views -- is not against . . . regulation, but against changes in current policy that are not justified by the rulemaking record.

Id. at 42 (emphasis in original). These cases teach that the Commission need not undertake action to disturb PTAR in its existing form absent record evidence that the rule is not working. This clearly is not the case.

2. **PTAR Is Serving Its Intended Purposes Well**

13. Quite the contrary, PTAR has been extraordinarily successful in fulfilling the purposes for which it was adopted. Among other things, PTAR was instituted in order to foster a healthy first-run syndication industry and enhance the vitality of independent stations:

In the top 50 markets, which are the essential base for independent producers to market programs outside the network process, they are at such a serious disadvantage that prime time first run syndicated programming has virtually disappeared. Such programming is the key to a healthy syndication industry because it is designed for the time of day when the available audience is by far the greatest. . . . The lack of available prime time on network affiliates adversely affects the capacity of this alternate programming source to supply programming for the independent stations, and particularly the still-struggling UHF independents upon which Congress and the Commission have relied for a fully competitive nationwide television broadcast service.

\* \* \*

We believe this modest action [PTAR] will provide a healthy impetus to the development of independent program sources, with concomitant benefits in an increased supply of programs for independent (and, indeed, affiliated) stations. The entire development of UHF should be benefited.

**Amendment of Part 73 of the Commission's Rules and Regulations With Respect to**

**Competition and Responsibility in Network Television Broadcasting**, 23 F.C.C.2d 382, 394-

95 (1970), modified on recon., 25 F.C.C.2d 318 (1970).

14. Moreover, the prohibition on top 50 market ABC, CBS and NBC affiliates airing off-network syndicated programming during the access hour is an integral component of PTAR. In adopting the rule, the Commission expressly noted that "[o]ff-network programs may not be inserted in place of the excluded network programming; to permit this would destroy the essential purpose of the rule to open the market to first run syndicated programs." Id. at 395. The Commission affirmed this view in 1975: "It is readily apparent that elimination of [the off-network] restriction would lead to a large-scale incursion into

cleared time by use of off-network material, sharply reducing the availability of time to sources of new, non-network material." Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, § 73.658(k) of the Commission's Rules, 50 F.C.C.2d 829, 848 (1975).

15. There can be no doubt that PTAR has succeeded in fulfilling the purposes for which it was adopted. There is now a vigorously competitive first-run syndication marketplace, producing a vast array of innovative first-run programs for the viewing public. According to comments filed in the fin-syn proceeding, in 1990 there were over 100 competing distributors of syndicated programs offering nearly 250 first-run programs to local stations.<sup>1/</sup> Some first-run programs such as "Star Trek: The Next Generation" and "Deep Space Nine" are highly competitive with prime-time network fare.

16. Similarly, PTAR has been the catalyst for explosive growth in the independent television industry. As of the end of 1989, the number of independent television stations had quadrupled since 1970 and doubled since 1983. From 90 in 1970, the number of independent television stations has blossomed to over 400 today. Independent television stations are rapidly becoming outlets for prime-time first run syndication, and more and more independents are initiating local newscasts as well as expanding their offerings of high-quality public affairs, children's, and entertainment programs. And, of course, the increased health of the stations now affiliated with Fox has allowed the emergence of a fourth network, with fifth and sixth national networks in the offing.

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<sup>1/</sup> Comments of the Program Producers and Distributors Committee in Response to Second Further Notice of Proposed Rulemaking, MM Docket No. 90-162 (filed February 1, 1993), at 3-4.

**3. There Is Presently No Policy Justification  
for Eliminating or Modifying PTAR**

17. In a nutshell, PTAR is working and continues to work. Accordingly, there is no reason to disturb the rule absent the existence of a compelling legal or policy justification for doing so. As noted above, there should be no genuine question about PTAR's legal soundness. Nor has the Commission been presented with a sufficient policy ground for repealing or changing the rule.

18. The Commission is faced with no policy argument for repealing PTAR in its entirety. The only policy arguments that have been offered concern the off-network syndication aspect of the rule. The primary argument is that the off-network restriction impedes the competitive viability of top 50 market ABC, CBS, and NBC affiliates in their local markets by denying them the ability to carry off-network programming in the access hour. This concern is overstated. First, the first-run syndicated programming shown by ABC, CBS and NBC affiliates in the prime time access hour is highly competitive with the off-network programming offered by independents and Fox "indie-affiliates." In fact, a review of November 1993 Nielsen ratings data (average Monday-Friday) for the prime time access hour in the top 50 markets reveals that in the vast majority of the markets, a first-run program aired by an ABC, CBS, or NBC affiliate was the most-viewed prime time access program in the market. In no case was an off-network syndicated program the ratings leader. In several of the top 50 markets, as many as six first-run programs outperformed the highest-rated off-network series in prime time access. Indeed, as attested to by the large number of ABC, CBS, and NBC affiliates airing shows such as "Donahue," "Oprah," and

"Hard Copy," ABC, CBS and NBC affiliates often carry first-run programs even in dayparts where they have the opportunity to air off-network series.

19. Moreover, and importantly, under PTAR ABC, CBS, and NBC affiliates in the top 50 markets are still free to obtain off-network programming for exhibition at times outside the prime time access hour. ABC, CBS, and NBC affiliates can and do air popular off-network series during late afternoon (4:00-6:00 p.m.) and early morning (9:00-11:00 a.m.). There has been no showing that top 50 market ABC, CBS and NBC affiliates are significantly harmed by the inability to air off-network syndicated programming during prime time access.

20. While elimination or modification of PTAR is not necessary to help the established top 50 market affiliates of ABC, CBS, and NBC, such elimination or modification would threaten to seriously harm the Fox affiliates, as well as non-Fox independent stations in the top 50 markets, for whom the ability to air off-network programming in the prime time access hour is critical. A 1986 study commissioned by the Association of Independent Television Stations, Inc. found that early-fringe and prime access dayparts can contribute up to one-half of an independent station's total revenue.<sup>2/</sup> As recently as last year, the Commission stated in the fin/syn proceeding that "independent stations would be harmed if they could not obtain hit off-network shows" for exhibition in these valuable dayparts.<sup>3/</sup>

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<sup>2/</sup> Frazier, Gross & Kadlec, Inc., Independent Thinking. An Overview of the Independent Television Industry (1986), at 6-4.

<sup>3/</sup> Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd 8270, 8294 n.64 (1993).

21. The Fox affiliates in the top 50 markets are no different. Like independent stations not affiliated with Fox, the Fox affiliates in the top 50 markets wish to retain their financial viability and continue the growth that PTAR in large part has made possible. Rescinding PTAR in its entirety or eliminating the off-network restriction at the present time would jeopardize these objectives by threatening these stations' ability to air popular off-network series in the prime time access hour, where this programming is most profitable for them.

**4. The Related Fin-Syn Proceeding Is Yet Another Reason Not to Disturb PTAR**

22. The continuing proceeding concerning the fin-syn rules, which has been ongoing for some four years, is yet another reason for retaining PTAR in its present form. PTAR and the fin-syn rules were adopted together as complementary components of a regulatory scheme to reduce the dominance of ABC, CBS, and NBC and open up avenues for more diversity in television programming. At present, the fin-syn rules have been modified to eliminate many of the old restrictions, and the remaining restrictions are scheduled to expire in November 1995 unless the Commission acts otherwise in a proceeding to review the fin-syn issues scheduled for May 1995. Given the high degree of uncertainty concerning the present modified version of the fin-syn rules (which are presently under court appeal), and given the interrelationship between those rules and PTAR, the Commission should be loath to consider any modifications to PTAR until the new regulatory landscape becomes settled.

### **III. Conclusion**

The relaxation and probable ultimate elimination of the fin-syn rules will bring vast changes in the television programming marketplace. Only time will determine PTAR's ultimate place in this new environment. Until these seismic changes in the television marketplace have a chance to play out, however, it would be very risky and premature for the Commission to tamper with PTAR -- the one core regulation that remains to protect the diversity brought to the market by first-run producers and the independent television industry of which the Fox affiliates are an important part. Against this backdrop, the present question is whether, in the Commission's broad discretion to consider whether to institute rulemaking proceedings, there is any compelling reason to change a rule that has not been shown to be broken. The Fox Affiliates submit that the answer is clearly "no". Accordingly, the Fox Affiliates urge the Commission to deny the three above-captioned pleadings and take no action at this time to alter PTAR in its present form.

Respectfully submitted,

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Dated: June 14, 1994



**CERTIFICATE OF SERVICE**

I, Susan R. Fisenne, a secretary in the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that true copies of the foregoing **"COMMENTS OF THE FBC TELEVISION AFFILIATES ASSOCIATION"** were sent this 14th day of June, 1994, by first class United States mail, postage prepaid, to the following:

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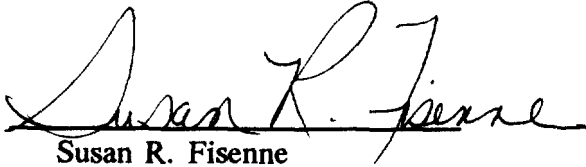
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